

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY**

DUKES LUMBER CO.,	)	
	)	
Plaintiff,	)	C.A. No. 05-07-167
	)	
v.	)	
	)	
RICHARD L. EWING,	)	
t/a R.L. EWING	)	
	)	
Defendant.	)	

Submitted March 30, 2006  
Decided May 10, 2006

*Patrick Scanlon, Esquire, counsel for Plaintiff.*  
*Dean A. Campbell, Esquire, counsel for Defendant.*

**DECISION AFTER TRIAL**

Trial was held in the above-captioned debt collection action on February 22, 2006. As more fully set forth below, the Court ruled from the bench in favor of the Plaintiff, *if* the Plaintiff's claim was not barred by the statute of limitations, and reserved decision and requested briefing on this issue. For the reasons stated below, the Court finds that the Plaintiff's claim is not barred by the applicable statute of limitations, and enters judgment accordingly.

**BACKGROUND**

On August 12, 1999, the Defendant entered into a written agreement with the Plaintiff for the extension of credit to purchase lumber and other construction material. The Defendant testified that he maintained an open credit account with the Plaintiff, identified as account # EW1500, over

several years in order to complete his work as a general contractor. On or about September 10, 2000, the Defendant entered into a contract to complete the construction of a residence for a Ms. Cindy Brice. According to the Defendant, all of the materials used to construct the residence were purchased under the credit account with the Plaintiff.

The Defendant testified that Ms. Brice failed to pay the last draw on her contract. In turn, he filed a mechanics lien on her property. In his Answer, the Defendant admitted that he owed the principal amount of the debt on account # EW1500, but he argued that he was not liable for any interest that accrued over the duration of his lawsuit with Ms. Brice. Additionally, in his Amended Answer, the Defendant asserted that the statute of limitations expired prior to the Plaintiff's filing, which barred the Plaintiff from obtaining judgment against him.

The parties entered into the credit agreement on August 12, 1999. The evidence established that Defendant breached the obligation when he defaulted on making payments in April of 2001. Even after the Defendant defaulted on account # EW1500, he continued to purchase materials from the Plaintiff's store; however, those purchases were not made on the credit account at issue. Witnesses for both parties testified that in March of 2004, the Plaintiff agreed to give the Defendant a discount on his purchases from Plaintiff. Plaintiff and Defendant agreed that, rather than apply Defendant's discount directly to those purchases, the amount of discount on each purchase would be applied to the amount Defendant owed on his credit account # EW1500 as a "cash" payment in order to reduce the existing debt. For several years, the discounts were the only credits applied to the account. On August 6, 2004, however, the Defendant resumed making additional payments on the account in the form of personal checks. (Pl. Ex. 6.) The Plaintiff filed this action on July 11, 2005.

At the close of evidence, the Court ruled from the bench and found

that the proper parties were before the Court and that the Defendant admitted owing the principal amount of the debt. Furthermore, the Court found that the agreement at issue was a valid contract for credit, which was personally guaranteed by the Defendant and his wife, Kimberly Ewing. Accordingly, the guarantors were jointly and severally liable for the debt. The Court determined that the principal amount of the debt was \$5,470.07 and that if the statute of limitations did not bar the Plaintiff's claim, the Plaintiff would be entitled to that amount, plus 8.5% per annum pre- and post-judgment interest. Thus, the sole issue remaining before this Court is whether the statute of limitations bars the Plaintiff's claim.

### **DISCUSSION**

In order to determine whether the statute of limitations bars the Plaintiff's action, the Court first must decide which statute applies to the case *sub judice*. The Defendant argues that the agreement is governed by a three-year statute of limitations pursuant to 10 *Del. C.* § 8106, while the Plaintiff contends that a four-year statute applies under 6 *Del. C.* § 2-725. Additionally, the Defendant argues that the statute of limitations was not tolled when the Defendant agreed to have his discounts applied to the account at issue, nor when he resumed remitting payments on the account in August 2004.

#### *The Three-Year Statute of Limitations Applies*

The Defendant argues that the cause of action before the Court is confined to a three-year statute of limitations pursuant to 10 *Del. C.* § 8106. However, the Plaintiff argues that the four-year statute of limitations found at 6 *Del. C.* § 2-725 applies because the account on which the Plaintiff seeks recovery consisted of numerous transactions for the sale of goods, namely, lumber and other construction materials. Upon review of the relevant statutes, the Court finds that § 8106 is the appropriate statute of limitations.

Section 2-725 provides that “an action for breach of any contract for sale [of goods] must be commenced within 4 years after the cause of action has accrued.” The promise to pay under the Credit Application, on which the Plaintiff seeks to recover, is not a contract for the sale of goods, but a contract for the extension of credit and repayment of debt. The Complaint alleges the Defendant defaulted on an open account for the extension of credit. The present action clearly is for breach of contract for sale of goods, and § 2-725 is not applicable.

Section 8106 provides, in part, that “no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations...shall be brought after the expiration of 3 years from the accruing of the cause of such action.” Plaintiff’s account records introduced into evidence prove that this action is based on a detailed statement that reflects the credits and debits of the parties, which arose from the Credit Application agreement. (Pl. Ex. 2.). Thus, the three-year limitation of § 8106 applies.

*The Statute of Limitations was Tolloed When the Defendant Agreed to Have His Discounts on Future Purchases Applied to the Account at Issue*

The statute of limitations begins to run when the cause of action accrues. *Wal-Mart Stores, Inc.*, 860 A.2d 312, 319 (Del. 2004). A cause of action accrues under § 8106 at the time of the wrongful act. *Id.* The Plaintiff submitted an aged trial balance, showing that the Defendant initially ceased making direct payments on account # EW1500 on or about April 27, 2001. (Pl. Ex. 1.) Defendant argues the statute of limitations commenced on that date. The Plaintiff filed its action on July 11, 2005, more than three years after April 27, 2001. However, it is well-settled that the statute of limitations is tolled when a defendant provides payment on account of a debt that has not yet been barred by the statute of limitations. *Patamon v. Suburban Propane Gas Corp.*, 505 A.2d 1309, \*1 (Del. 1986)

(citing *Levin v. Diamond State Poultry Co.*, 175 F. Supp. 851, 854 (D. Del. 1959)).

The Defendant argues that he made no payments on the account between the time of default in April, 2001 and August, 2004, when he next tendered personal checks to pay on account # EW1500. Thus, he contends that no payment was made within the three year limitations period to toll it from expiring.

Payment on an account acts to toll the statute of limitations only if the defendant clearly and unequivocally indicates an intention to partly discharge the debt at issue. *Hart v. Deshong*, 8 A.2d 85, 87 (Del. Super. 1939). A partial payment to revive a debt does not have to be made in the form of cash money; the transfer of any property creates the same inference as a cash money payment. *Id.* at 88. The Defendant contends that the discounts applied to account # EW1500 were not unqualified and unconditional. The Defendant's testimony at trial, however, indicates otherwise.

The evidence established that, even though Plaintiff ceased extending credit to Defendant after his April, 2001 default in payment, Defendant continued to make cash purchases at Plaintiff's store. Both Mr. Dukes and the Defendant testified that in approximately March of 2004, the parties agreed that the Defendant would receive a 5% contractor's discount on cash purchases in the Plaintiff's store, and that the value of the discount would be applied to the debt remaining on account # EW1500, rather than be paid directly to the Defendant. Plaintiff's account records show that that such discounts were applied as "cash" payments to the account repeatedly from March 6, 2004 through December 23, 2004. (Pl. Ex. 2.) I find that the discounts applied to the account were the equivalent of cash payments because the Defendant clearly and unequivocally agreed to have his property interest in the discounts applied in order to reduce his debt on account # EW1500.

The Defendant claims that such a finding is against the interests of public policy because any creditor could thereby easily toll the statute of limitations by unilaterally applying credits to a debtor's account. (Def. Reply Brief at p. 3-4). However, the Defendant's testimony reflects that he agreed to have the discounts applied in this fashion, specifically to reduce his debt on account # EW1500. Thus, I find that the statute of limitations was tolled by the Defendant's unambiguous agreement to the application of the discounts, and not by the unilateral application of credits by the Plaintiff.

Because the Defendant's first partial payment was applied on March 6, 2004, before the three-year statute of limitations barred the Plaintiff's remedy, the statute of limitations was effectively tolled. Accordingly, the statute of limitations in this case did not begin to run until the last partial payment was applied on December 23, 2004. *See Patamon* at \*1. Therefore, the Plaintiff timely filed its Complaint on July 11, 2005.

### **CONCLUSION**

For the foregoing reasons, the Court finds that the three-year statute applies to the case at hand. Also, the statute was tolled when the Defendant agreed to have discounts received on other purchases applied to his credit account balance. Therefore, the Plaintiff timely filed this action and the statute of limitations does not bar the remedy sought. According, judgment is hereby entered in favor of the Plaintiff in the amount of \$5,470.07 plus 8.5% per annum pre and post judgment interest and court costs.

**IT IS SO ORDERED.**

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**Kenneth S. Clark, Jr.**  
**Judge**

